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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/768,394	01/24/2001	Franz Haas	WEB-19967	1357

7590

04/16/2003

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EXAMINER

WONG, LESLIE A

ART UNIT	PAPER NUMBER
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1761

13

DATE MAILED: 04/16/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.  
09/768,394

Applicant(s)  
Haas et al.

Examiner  
Leslie Wong

Art Unit  
1761



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE three MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on Jan 24, 2003
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-35 is/are pending in the application.
- 4a) Of the above, claim(s) 20-35 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-19 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some\* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\*See the attached detailed Office action for a list of the certified copies not received.

- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_ 6) ☐ Other:

Art Unit: 1761

Applicants' arguments as to the withdrawal of claims 28-35 have been considered. Submitted claims 28-35 are method claims. The submitted claims and claims 1-19 are related as process of making and product made. In the instant case the product as claimed can be made by another and materially different process such as a process in which the product does not have a shaping step. Accordingly, claims 28-35 are withdrawn from consideration.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 2, and 6 are rejected under 35 U.S.C. 102(b) as being anticipated by Kim for the reasons set forth in rejecting the claims in the last Office action (Paper No. 11).

Kim teaches a baked product comprising xylitol as a sugar replacer (see entire document, especially the abstract and claim 1).

Applicant's arguments filed January 24, 2003 have been fully considered but they are not persuasive.

Applicant argues that Kim does not teach a baking mixture for non-perishable baked goods made from flours and/or starches where the resulting product is crispy.

Kim clearly teaches the use of xylitol as a sugar replacer. None of the claims specifically claim a flour/starch content that differs from Kim. Kim merely teaches that the product becomes

Art Unit: 1761

soft quickly where it is not seen how this differs from the claimed invention, as crispiness maintenance times are not claimed.

Claims 1, 2, and 11 are rejected under 35 U.S.C. 102(b) as being anticipated by Kondo for the reasons set forth in rejecting the claims in the last Office action (Paper No. 11).

Kondo teaches a cake comprising erythritol as a sugar replacer in the amounts claimed (see abstract).

Applicant's arguments filed January 24, 2003 have been fully considered but they are not persuasive.

Applicant argues that Kondo does not teach a baking mixture for non-perishable baked goods made from flours and/or starches where the invention requires the claimed bakery mixtures and resulting baked products to have the property of being deformable in a heated plastic state.

Kondo clearly teaches the use of erythritol as a sugar replacer, where erythritol is an aliphatic polyol as is claimed. Kondo et al also teach xylitol which is an aliphatic polyol as is claimed. None of the claims specifically claim a flour/starch content that differs from Kondo. Kondo teaches the claimed components and a resulting baked product where deformability at an elevated temperature would be no more than inherent. It is also noted that the claims are product claims and applicant does not specifically claim that the product is deformed.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

Art Unit: 1761

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kim and Kondo for the reasons set forth in rejecting the claims in the last Office action (Paper No. 11).

Kim and Kondo are cited as above.

The claims differ as to the specific type of baked product and the amounts used.

Once the art has recognized the use of erythritol and xylitol as sugar replacers in baked goods the amount and manipulation of these components would be well-within the skill of the art. At most the amounts are seen as no more than optimization, see *In re Boesch* 205 USPQ 215.

It is noted that Kim discloses all bakery products (see claim 1), where bakery products would include wafers. Kim also discloses the use of egg which contains water.

It would have been obvious to a person of ordinary skill in the art, at the time the invention was made, to use xylitol and erythritol in baked products because the use of xylitol and erythritol as sugar replacers in baked products is conventional in the art.

Applicant's arguments filed January 24, 2003 have been fully considered but they are not persuasive.

Applicant argues that neither Kim nor Kondo does not teach a baking mixture for non-perishable baked goods made from flours and/or starches where the invention requires the claimed

Art Unit: 1761

bakery mixtures and resulting baked products to have the property of being deformable in a heated plastic state

Kim clearly teaches the use of xylitol as a sugar replacer. Kondo clearly teaches the use of erythritol as a sugar replacer. Kim and Kondo teach the claimed components and a resulting baked product where deformability at an elevated temperature would be no more than obvious as the same components are used. It is also noted that the claims are product claims not process claims, and applicant does not specifically claim that the product is deformed, merely that the product is deformable. It is not clear how this differs from that of the prior.

In the absence of unexpected results, it is not seen how the claimed invention differs from the teachings of the prior art. Applicant's claims are drawn to a combination of known components which produces expected results, see *In re Kerkhoven* 205 USPQ 1069 and *In re Gershon* 152 USPQ 602.

All of the claim limitations and arguments have been considered. None of them are seen as serving as basis for patentability.

No claim is allowed.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 C.F.R. § 1.136(a).

A SHORTENED STATUTORY PERIOD FOR RESPONSE TO THIS FINAL ACTION IS SET TO EXPIRE THREE MONTHS FROM THE DATE OF THIS ACTION. IN THE EVENT A FIRST RESPONSE IS FILED WITHIN TWO MONTHS OF THE MAILING DATE OF THIS FINAL ACTION AND THE ADVISORY ACTION IS NOT MAILED UNTIL AFTER THE END OF THE THREE-MONTH SHORTENED STATUTORY PERIOD, THEN

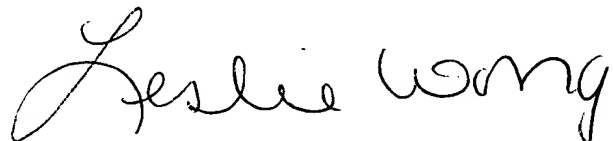
Art Unit: 1761

THE SHORTENED STATUTORY PERIOD WILL EXPIRE ON THE DATE THE ADVISORY ACTION IS MAILED, AND ANY EXTENSION FEE PURSUANT TO 37 C.F.R. § 1.136(a) WILL BE CALCULATED FROM THE MAILING DATE OF THE ADVISORY ACTION. IN NO EVENT WILL THE STATUTORY PERIOD FOR RESPONSE EXPIRE LATER THAN SIX MONTHS FROM THE DATE OF THIS FINAL ACTION.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Leslie Wong whose telephone number is (703) 308-1979. The examiner can normally be reached on Tuesday-Friday.

The fax number for this Group is (703) 872-9310 for non-final responses and (703) 872-9311 for after-final responses.

Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0661.

A handwritten signature in cursive script that reads "Leslie Wong".

**Leslie Wong**  
**Primary Examiner**  
**Art Unit 1761**

LAW  
April 16, 2003